Editor's note: Appeal filed sub nom Dinning, Administrator of the Estate of Lighthill v. Babbit, Civ. S-99-1276 6 DFL PAN (E.D. Cal.); aff'd (Sept. 25, 2000)

ESTATE OF JOHN M. LIGHTHILL

IBLA 92-106 Decided December 14, 1998

Appeal from a decision of the California State Office, Bureau of Land Management, rejecting mineral patent application as to surface estate of land encompassed by placer mining claim. CACA 21645.

Affirmed.

1. Mining Claims: Patent--Wild and Scenic Rivers Act

Subject to valid existing rights, section 9(a)(ii) of the Wild and Scenic Rivers Act limits the Department's authority to convey title to a valid mining claim affecting lands within the Wild and Scenic Rivers system: all that may be conveyed is title to mineral deposits and a limited right to use the surface of the claim. Where an application for patent was not filed and purchase money not tendered prior to the inclusion of the underlying lands in the system, claimant does not have a valid existing right, and his application is properly rejected to the extent it seeks patent to the surface estate of the claim.

APPEARANCES: Jeannette Dinning, Administrator, Estate of John M. Lighthill, Reading, California, for Appellant; Rose Miksovsky, Esq., Office of the General Counsel, U.S. Department of Agriculture, San Francisco, California, for the Forest Service.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

The Estate of John M. Lighthill (Appellant), through its administrator Jeannette Dinning, has appealed from the October 1, 1991, decision of the California State Office, Bureau of Land Management (BLM), rejecting mineral patent application CACA 21645 to the extent that it sought title to the surface estate of land encompassed by The Boulder Claim placer mining claim (CA MC 33886), located adjacent to the Scott River. 1/

1/ Consideration of this appeal has been suspended pending consideration by the Secretary of similar legal issues concerning patenting of lands within the National Wilderness Preservation System.

The claim was originally located by John M. Lighthill on April 30, 1933, and was held and worked by him for many years. However, no mineral patent application was filed with BLM until February 5, 1988, when an application was submitted by his estate. 2/

The claim, which encompasses 18.75 acres, is situated in adjoining secs. 20, 21, and 28, T. 45 N., R. 10 W., Mount Diablo Meridian, Siskiyou County, California, within the Klamath National Forest. 3/ On January 19, 1981, prior to the filing of the mineral patent application, the Scott River was designated part of the National Wild and Scenic Rivers system by the Secretary of the Interior, pursuant to section 2(a) of the Wild and Scenic Rivers Act (W&SRA), as amended, 16 U.S.C. § 1273(a) (1994). The portion of the river that runs past the subject claim was classified a "scenic river," as defined in 16 U.S.C. § 1273(b) (1994).

On October 13, 1989, following publication and posting of notice of the mineral patent application and upon payment of the purchase price, BLM issued a "Mineral Entry Final Certificate" for the claim. The certificate provided that patent would issue "if all is found regular and upon demonstration and verification of a valid discovery of a valuable mineral deposit."

In 1990, USFS undertook to determine whether the subject claim contained a valuable mineral deposit under 30 U.S.C. § 22 (1994), and thus constituted a valid mining claim subject to patent under the general mining laws. See 30 U.S.C. §§ 29, 35 (1994); Best v. Humboldt Placer Mining Co.,

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2/ The patent application was filed by Richard A. Lighthill, Lighthill's son, as executor of his estate. There is no evidence that the estate had been submitted for probate at that time, or that Richard A. Lighthill had been formally appointed executor of his father's estate. On Feb. 9, 1989, Jeannette Dinning, Lighthill's daughter, submitted the estate for probate, seeking to be appointed its administrator. The record indicates that she was appointed the administrator and that title to the subject claim vested in the estate on Mar. 1, 1989.

Evidence in the record and provided by Appellant on appeal indicates that preparation of the patent application had begun before Feb. 5, 1988. There is evidence that Lighthill signed a patent application in December 1980. See Statement of Reasons at 4. However, there is no evidence that an application was filed with BLM until 1988. Filing with BLM is required to initiate the patent application process. See 30 U.S.C. § 29 (1994); 43 C.F.R. §§ 3862.1-1(a) and 3863.1(a).

3/ By order dated May 21, 1993, the Forest Service, U.S. Department of Agriculture (USFS), the manager of the surface estate, was permitted to intervene in the instant proceeding.

The claim originally encompassed 20 acres of land, but, by decision dated May 4, 1988, BLM declared the claim null and void ab initio as to 1.25 acres of land in the W½NE¼NW¼NW¼NW¼ section 28 because that land had been patented at the time of location of the claim in 1933. No appeal was taken. BLM also rejected Appellant's patent application as to that land.

371 U.S. 334, 335 (1963). In a "Mineral Report" dated September 21, 1990, based on the results of its earlier field investigations, USFS concluded that the claim contained a valuable deposit of gold both at the time the land was included in the National Wild and Scenic Rivers system and at the time of the filing of the patent application. (Mineral Report at 30-31, 34.) The report was reviewed and approved by the Forest Supervisor, Klamath National Forest, on January 9, 1991.

USFS' mineral report concluded, based on the finding that the subject claim contained a valuable gold deposit on January 19, 1981, that the claim constituted a "valid existing right" under section 9(a)(ii) of the W&SRA, and that the patent should therefore include the surface estate. (Mineral Report at 30-31; Memorandum to Chief, Locatable Minerals Section, California State Office, BLM, from Office of General Counsel, U.S. Department of Agriculture, dated Jan. 22, 1991; Letter to BLM from Director, Minerals Area Management, dated May 3, 1991.) However, in subsequently recommending that the claim be clearlisted for patent, all else being regular, USFS altered this view, stating that Appellant was only entitled to a patent of the mineral estate and recommending to BLM that the patent be so limited.

BLM concurred in the mineral report on May 8, 1991, but initially disagreed with the USFS' recommendation that patent issue only as to the mineral estate, concluding instead that Appellant was entitled to a patent of both the mineral and surface estates. However, BLM sought an opinion from the Regional Solicitor regarding this matter. (Memorandum to the Regional Solicitor, from the State Director, California, BLM, dated June 17, 1991.) That opinion was contained in a September 4, 1991, memorandum from the Office of the Regional Solicitor to the State Director, BLM. It concluded that Appellant, having perfected its rights under the mining laws by the discovery of a valuable mineral deposit, was entitled to a patent under section 9(a)(ii) of the W&SRA, but only to the mineral estate.

In its October 1991 decision, BLM, noting that USFS had validated the subject mining claim, approved Appellant's mineral patent application, but, relying on the Regional Solicitor's September 1991 opinion, held that Appellant was entitled to a patent only to the mineral estate on the claim and to such use of the surface as was necessary to carry on mining operations, subject to regulation. Accordingly, BLM concluded that it would issue a patent to the mineral deposits only, with a reservation of the surface estate to the United States, in effect rejecting the patent application as to the surface estate. This appeal ensued.

[1] Section 9(a)(ii) of W&SRA provides:

> [S]ubject to valid existing rights, the perfection of, or issuance of a patent to, any mining claim affecting lands within the [National Wild and Scenic Rivers] system shall confer or convey a right or title only to the mineral deposits and such rights only to the use of the surface and the surface resources

> as are reasonably required to carrying on prospecting or mining operations and are consistent with such regulations as may be prescribed * * * in the case of national forest lands, by the Secretary of Agriculture.

82 Stat. 915 (Oct. 2, 1968) (emphasis supplied). 4/

The statutory language contains two parallel threads addressing two distinct circumstances. The second of these sharply restricts the Department's authority to patent "any claim affecting lands within the system." Thus, under section 9(a)(ii), from its effective date forward,

> subject to valid existing rights, issuance of a patent to * * * any mining claim affecting lands within the [National Wild and Scenic Rivers] system shall * * * convey * * * title only to the mineral deposits and such rights only to the use of the surface and the surface resources as are reasonably required to carrying on prospecting or mining operations and are consistent with such regulations as may be prescribed * * * in the case of national forest lands, by the Secretary of Agriculture.

(Emphasis supplied.) As a result, even though Appellant's claim may have been "perfected" by the discovery of a valuable mineral deposit prior to inclusion of the Scott River in the Wild and Scenic Rivers system, the Department's authority to issue patent is expressly limited to the authority to convey title to the mineral deposits and a limited right to use the surface.

It is established that Congress may repeal the Department's authority to issue patent to a mining claim if the claimant's inchoate right to receive patent has not vested. See, e.g., Swanson v. Babbitt, 3 F.3d 1348, 1350 (9th Cir. 1993). 5/ The limitation of Departmental authority in section 9(a)(ii) prohibiting patenting of the surface estate is consonant with the goal announced in section 9(a) of preventing unnecessary impairment of the scenery within the component area and safeguarding the river against pollution. Where the fundamental thrust of a statute is to protect and maintain the natural character of affected lands, a narrow

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4/ The section is codified at 16 U.S.C. § 1280(a)(ii) (1994), but the language appearing there is missing the word "or" as highlighted. It is clear that the language set out in the U.S. Statutes at Large is correct.

5/ We note that the court in Swanson held that the right does not vest upon the submission of a patent application even if it is filed before the Congressional curtailment of Departmental patent authority, where the Department contests the validity of the application and thus delays its issuance. Swanson v. Babbitt, 3 F.3d at 1353. In the present case, no patent application was filed prior to the enactment of section 9(a)(ii) of W&SRA.

interpretation of the valid existing rights language is called for. See Patenting of Mining Claims and Mill Sites in Wilderness Areas, M-36994 (Approved by Secretary Babbitt on May 22, 1998), at 5, 7.

Appellant maintains that section 9(a)(ii) does not apply to this claim, as it was perfected prior to inclusion of the river in the system, arguing, in effect, that "perfected claims" are not subject to the patent limitation. As noted above, the syntax of the provision does not support that contention.

The first thread of parallel language in that provision concerns rights conferred by claims that are perfected following inclusion of lands in the Wild and Scenic Rivers system:

> [S]ubject to valid existing rights, the perfection of * * * any mining claim affecting lands within the [National Wild and Scenic Rivers] system shall confer * * * a right * * * only to the mineral deposits and such rights only to the use of the surface and the surface resources as are reasonably required to carrying on prospecting or mining operations and are consistent with such regulations as may be prescribed * * * in the case of national forest lands, by the Secretary of Agriculture.

The Congressional purpose in addressing mining claims perfected after the inclusion of a river in the system in section 9(a) was not to differentiate them from claims (such as Appellant's) perfected prior to that time, or to exempt the latter from the patent restriction of section 9(a)(ii). It was instead to clarify that the perfection of any mining claims after the inclusion of a river in the system would afford the holder only limited rights.

It was necessary in section 9(a)(ii) for Congress to address claims perfected after inclusion of the river in the system because claims could, under various circumstances, be legally located on lands near the river and perfected after inclusion. As originally enacted, the withdrawal provision section 9(a)(iii) of W&SRA, covered only lands within one-quarter mile of the bank of any designated river. Thus, lands outside the one-quarter mile corridor were not automatically closed to entry when the river was included in the system, and a claimant could legally locate and perfect claims on those lands that might nevertheless "affect" lands within the system. See generally John R. Lynn, 106 IBLA 317 (1989). Accordingly, Congress clarified in section 9(a)(ii) that post-inclusion perfection of a mining claim "affecting lands within the system" would confer on the locator only rights to the mineral deposits and limited use of the surface.

Further, the statute provided that such use would be restricted by regulations, as contemplated by section 9(a)(i), which empowered the Department to prescribe regulations governing operations on claims perfected after inclusion. Section 9(a)(ii) emphasizes that all mining activity on lands affecting the National Wild and Scenic Rivers system, must be

"consistent" with those regulations. Thus, Congress attempted to limit the effects of mining operations on the surface of lands within the National Wild and Scenic Rivers system.

At the same time, language provided that patenting of any claim affecting lands within the system, whether before or after inclusion of the river in the National Wild and Scenic Rivers system, would not transfer title to the surface estate. Thus, Congress protected the surface of lands within the system from being patented out of Federal ownership and avoided created inholdings of privately-owned surface within the system.

Appellant argues that its claim is a "valid existing right," so that the patent limitation is subject to its claim and does not restrict its right to obtain patent to the surface estate. It is undenied that, owing to Lighthill's discovery, he (and later Appellant) gained a right of present and exclusive possession and enjoyment of the claim, which runs against not only third parties, but also the United States and is a recognized property right. See 30 U.S.C. §§ 26, 35 (1994); Wilbur v. Krushnic, 280 U.S. 306, 316-17 (1930); Manuel v. Wulff, 152 U.S. 505, 510-11 (1894); Forbes v. Gracey, 94 U.S. 762, 767 (1877); United States v. Rizzinelli, 182 F. 675, 683 (D. Idaho 1910); 2 Am. L. of Mining §§ 36.03[1], 36.03[2] (2d ed. 1984). This right was not diminished because he did not seek patent: the holder of a claim supported by a discovery need not seek patent; his unpatented mining claim remains a fully recognized possessory right. 30 U.S.C. § 39 (1994); United States v. Locke, 471 U.S. 84, 86 (1985). Where a claimant has a valid claim under the mining laws, he has the right to seek and, if all else is regular, obtain a patent of full legal title. See Union Oil Co. of California v. Smith, 249 U.S. 337, 349 (1919); State of Alaska v. Thorson (On Reconsideration), 83 IBLA 237, 243, 91 I.D. 331, 335 (1984); 2 Am. L. of Mining § 36.03[3] (2d ed. 1984). Thus, upon making a discovery, Appellant and its predecessor gained the option of applying for and, upon further compliance with the law, securing a patent conferring title in fee simple to the lands contained in the claim. Teller v. United States, 113 F. 273, 280 (8th Cir. 1901).

However, the right of the holder of a valid mining claim is merely "the opportunity to apply for a patent." Alaska Miners v. Andrus, 662 F.2d 577, 579 (9th Cir. 1981). Although a claimant's rights to the mineral estate and to the use of the surface of the claim for the purpose of extracting the mineral deposit arises upon the location of the claim and the making of a discovery, a claimant's equitable title to the land arises only upon the tendering of the purchase price established by Congress. See Swanson v. Babbitt, supra; Teller v. United States, supra; United States v. Rizzinelli, supra. Most importantly, it is established that Congress may remove the Department's patent authority prior to the tendering of a patent application and purchase price and that loss of the opportunity or option to apply for a patent as a result of Congressional action is not an unconstitutional taking by inverse condemnation. The claimant suffers only the denial of the opportunity to obtain greater property than that which he

owned upon the effective date of the Act of Congress. That is not divestment of a property interest. Freese v. United States, 639 F.2d 754, 758 (Ct.Cl.), cert. denied, 454 U.S. 827 (1981). 6/

That the discovery of a valuable mineral deposit does not, by itself, create a vested right to patent is made clear when one considers cases where a discovery is made and then lost. Thus, even though a claimant may have made a discovery and actually mined material from a claim, until a patent application has been perfected and the equitable title has vested, a claimant runs the risk of losing his discovery if the deposit is exhausted or if a material change in market conditions renders it unreasonable to expect that the mineral can be mined at a profit. See, e.g., Best v. Humboldt Placer Mining Co., 371 U.S. at 336; Multiple Use, Inc. v. Morton, 353 F. Supp. 184, 193 (D. Ariz. 1972), aff'd, 504 F.2d 448 (9th Cir. 1974); United States v. Mavros, 122 IBLA 297, 302 (1992). If the claimant waits until the discovery is lost (either because the mineral is mined out or economic conditions render it uneconomic) and then applies for patent, his application is properly rejected.

It is established that Congress may repeal the Department's authority to issue patent to a mining claim if the claimant's inchoate right to receive patent has not vested. See, e.g., Swanson v. Babbitt, 3 F.3d at 1350. Here, in section 9(a)(ii) of W&SRA, Congress expressly limited the authority of the Department to issue patents to any claims located on lands within the Wild and Scenic Rivers system. Since Appellant had not applied for a patent and complied with all the requirements for obtaining a patent under the Mining Law of 1872 prior to the inclusion of the Scott River in the Wild and Scenic Rivers system, there was no "valid existing right" to a patent to the surface estate so as to remove the claim from the patent limitations imposed by section 9(a)(ii) of the W&SRA. See Patenting of Mining Claims and Mill Sites in Wilderness Areas, supra, at 4, 21. 7/

6/ In Freese, the court held that, at the time of designation of the Sawtooth National Recreation Area in 1972, a mining claimant had not acquired a vested right to a patent to land within that area because, even though he had discovered a valuable mineral deposit prior to designation, he had failed to comply with all of the requirements for issuance of a patent, including filing a patent application and paying the requisite purchase price. Freese v. United States, 639 F.2d at 756-58.

7/ In proposing wild and scenic rivers legislation in 1967, including the language that later became section 9(a)(ii) of the W&SRA, the Department of the Interior stated that it was "patterned after the Wilderness Act of September 3, 1964[, as amended, 16 U.S.C. §§ 1131-1136 (1994)]." H.R. Rep. No. 1623, 90th Cong., 2d Sess. 22 (1968), reprinted in 1968 U.S.C.C.A.N. 3801, 3822. We note that section 4(d)(3) of the Wilderness Act, as amended, 16 U.S.C. § 1133(d)(3) (1994), also provides for a similar mineral estate limitation for patents issued for mining claims located within wilderness areas: "[S]ubject to valid existing rights, all patents issued under the mining laws of the United States * * * shall convey title

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

David L. Hughes
Administrative Judge

fn. 7 (continued)
[only] to the mineral deposits within the claim,* * * and no use of the surface of the claim or the resources therefrom not reasonably required for carrying on mining or prospecting shall be allowed except as otherwise expressly provided in this [Act]." As can be seen, this limitation is also "subject to valid existing rights." Accordingly, the Secretary's Decision concerning valid existing rights under the Wilderness Act is relevant to the instant matter.

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

Resolution of the instant appeal turns on the determination of two separate legal questions. The first of these is whether Congress could, consistent with the dictates of the Fifth Amendment's prohibition against uncompensated taking of private property, limit the rights of mining claimants whose claims were located within a component of the Wild and Scenic Rivers system (see 16 U.S.C. §§ 1271 to 1287 (1994)) to obtain an unrestricted patent of their mining claims where these claimants had not, at the time of the inclusion of the lands covered by the claims in the Wild and Scenic Rivers system, taken all necessary steps to obtain a patent of those claims. The second question, while seemingly similar, is actually quite distinct. It is whether Congress did limit the rights of mining claimants to obtain an unrestricted patent to only those who had, at the time of inclusion of the lands in the Wild and Scenic Rivers system, taken all necessary steps to obtain a patent to those claims. The first question is thus a general question respecting the limits of Congressional power while the second is a more specific question which can only be resolved by determining whether Congress chose to exercise the powers with which it is vested. As I will explain below, while I think that the answer to the first question is clearly in the affirmative, I also believe that the answer to the second question is much more problematic.

That Congress could, under certain circumstances, restrict the rights of mining claimants to obtain an unrestricted patent without running afoul of the Fifth Amendment is a conclusion not only supported by numerous recent Federal court decisions (see, e.g., Independence Mining Co. v. Babbitt, 105 F.3d 502 (9th Cir. 1997); Swanson v. Babbitt, 3 F.3d 1348 (9th Cir. 1993)) but one which naturally flows from the nature of the Congressional grant inherent in the General Mining laws. 1/ The mining laws of the United States, as codified in 30 U.S.C. §§ 21-54 (1994), actually provide two separate grants contingent upon the occurrence of two different events. Thus, section 3 of the Mining Law of 1872, 30 U.S.C. § 26 (1994), granted the locators of valid mining claims ownership of

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1/ Of course, Congress could, if it so desired, not only bar the patenting of claims regardless of how far along in the patenting process those claims had progressed but could actually prohibit the further exploitation of any claims not yet patented, even where those claims were supported by a discovery. Such actions, however, would implicate the Fifth Amendment's "takings" clause and might well necessitate the payment of "just compensation." See, e.g., United States v. North American Transportation & Trading Co., 253 U.S. 330 (1920); Whitney Benefits, Inc. v. United States, 926 F.2d 1169 (Fed. Cir. 1991); § 11 of the Mining in the Parks Act, 16 U.S.C. § 1910 (1994); § 3(a)(2) of the Jemez National Recreation Area Act, 16 U.S.C. § 460jjj-2(a)(2). The discussion in the text of this opinion, however, is directed to the question of the extent to which Congress could bar the patenting of mineral entries without giving rise to Fifth Amendment claims.

mineral deposits discovered within the claim as well as "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations." This grant was, as the court in Teller v. United States, 113 F. 273, 280 (8th Cir. 1901) noted, in the nature of a gratuity, which vested in the claimant upon the discovery of a valuable mineral deposit and the location of a mining claim thereon. See also Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959). It afforded the claimant the exclusive right of possession of the mineral and the right to use so much of the surface of the claim as was needed for mining purposes. See, e.g., United States v. Etcheverry, 230 F.2d 193, 195-96 (10th Cir. 1956); United States v. Rizzinelli, 182 F. 675, 681-83 (D. Idaho 1910); Bruce R. Crawford, 86 IBLA 350, 358-72, 92 I.D. 208, 213-20 (1985).

But, while the exclusive right of possession attendant to the discovery and location of a valuable mineral deposit was, as the Supreme Court noted in Forbes v. Gracy, 94 U.S. 762, 767 (1877), "property in the fullest sense of the word," and, so long as the claim was maintained in compliance with the law, afforded a right good against the United States (see Davis v. Nelson, 329 F.2d 840, 845 (9th Cir. 1964)), rights to use the surface and its resources (such as timber) were circumscribed by the requirement that only such uses as were "reasonably incident" to the development of the mineral deposit were authorized so long as legal title to the land remained in the United States. See, e.g., United States v. Allen, 578 F.2d 236 (9th Cir. 1978); Teller v. United States, supra. However, if a mineral claimant desired, he or she could, in addition to the exclusive right of possession afforded by 30 U.S.C. § 26 (1994), obtain full title to the surface estate. Title to the surface estate did not, however, derive simply as an incidence of the discovery of a valuable mineral deposit and the location of a mining claim therefor. Rather, as the court in Teller noted, the United States "has not seen fit to give away the land containing the minerals, but, on the contrary, has adopted the policy of selling the same to the locator, if he desires to purchase, on terms fixed by the acts of congress." Id.

This is an important distinction. While the discovery and location of a valuable mineral deposit were the necessary prerequisites of an application for a patent to the land, these acts were, of themselves, insufficient to vest a right to a patent in the mineral claimant. Rather, such acts merely afforded the claimant an opportunity to purchase the land upon proper application to the United States. See Alaska Miners v. Andrus, 662 F.2d 577, 579 (9th Cir. 1981). This opportunity is in the nature of a unilateral offer by the Government which is only accepted by the claimant upon fulfillment of the conditions precedent thereto: tender of a proper application and payment of the purchase price. As recent court cases make clear, Congress may eliminate or otherwise limit the ability of a claimant to apply for a patent without infringing upon any rights of the claimant, at least up until the time that the claimant has perfected his patent

application and tendered the purchase price for the claim. 2/ Thus, as I indicated at the beginning of this opinion, I believe that there is no question that Congress could eliminate or circumscribe the opportunity of a mineral claimant who had not perfected a patent application to obtain a full patent.

The second question presented by this case, whether Congress did intend to restrict the opportunities of those claimants whose valid claims preexisted the inclusion of the land into the Wild and Scenic Rivers system, presents a much more difficult analysis. The first point to consider, of course, is the actual language used in section 9(a) of the Wild and Scenic Rivers Act. As originally adopted, 3/ section 9(a) provided:

2/ While the recent cases all agree that the right of a mining claimant to obtain a full patent of the surface only vests upon completion of all acts necessary to obtain a patent, they disagree as to exactly what those acts entail. Thus, in Swanson v. Babbitt, supra, the Ninth Circuit held that where an on-going challenge to the validity of various mill site locations was not resolved until 1986, the patent applicant's rights to a patent did not vest until that date. Id. at 1354. This principle was extended by the Ninth Circuit in its decision in Independence Mining Co. v. Babbitt, supra, to include a situation in which the Department had not yet completed its determination as to the validity of the claim. Id. at 508-09. However, subsequent to these two decisions, the United States Court of Federal Claims issued a decision in Cook v. United States, 37 Fed. Cl. 435 (1997), in which, after an extensive analysis of the issue in light of the Swanson and Independence Mining Co. decisions, it expressly rejected the Ninth Circuit's approach, essentially concluding that, so long as subsequent events establish that the application for patent was proper and complete upon filing, any subsequent actions by the Secretary that may have been necessary to confirm this fact relate back to the date of the completion of the application and tender of the purchase price insofar as any question as to the date of vesting of the right to obtain a patent is concerned. Id. at 443-46.

In the instant case, it is not necessary to explore this question further, since the operative date herein, should it be concluded that the Wild and Scenic Rivers Act intended to restrict the rights of all prior claimants to obtain a patent except those who had already complied with the patenting requirements, would be Jan. 19, 1981, more than 7 years before an application to purchase the claim was submitted by the Lighthill estate. But see "Entitlement to a Mineral Patent Under the Mining Law of 1872," M-36990 (Nov. 12, 1997).

3/ It should be noted that, under amendments adopted in 1980, the withdrawal effectuated by section 9(a)(iii) for specified areas of "wild" rivers was expanded to included scenic and recreational rivers as well. See Act of Dec. 2, 1980, 94 Stat. 2416, 16 U.S.C. § 1280(b) (1994). Thus, the 1981 inclusion of the Scott River as a "scenic" river effected a withdrawal of the bed and all Federal lands within one-quarter mile of the banks of the river.

> Nothing in this Act shall affect the applicability of the United States mining and mineral leasing laws within components of the national wild and scenic rivers system except that--
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> (i) all prospecting, mining operations, and other activities on mining claims which, in the case of a component of the system designated in [16 U.S.C. § 1274], have not heretofore been perfected or which, in the case of a component hereafter designated pursuant to this chapter or any other Act of Congress, are not perfected before its inclusion in the system and all mining operations and other activities under a mineral lease, license, or permit issued or renewed after inclusion of a component in the system shall be subject to such regulations as the Secretary of the Interior * * * may prescribe to effectuate the purposes of this chapter;
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> (ii) subject to valid existing rights, the perfection of, or issuance of a patent to, any mining claim affecting lands within the system shall confer or convey a right or title only to the mineral deposits and such rights only to the use of the surface and the surface resources as are reasonably required to carrying on prospecting or mining operations and are consistent with such regulations as may be prescribed by the Secretary of the Interior * * *; and
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> (iii) subject to valid existing rights, the minerals in Federal lands which are part of the system and constitute the bed or bank or are situated within one-quarter mile of the bank of any river designated a wild river under this chapter or any subsequent Act are hereby withdrawn from all forms of appropriation under the mining laws and from operation of the mineral leasing laws including, in both cases, amendments thereto.

From the foregoing, it can be seen that section 9(a)(1) clearly provides that mining claims perfected after the land on which they are located is included in the Wild and Scenic Rivers system "shall be subject to such regulations as the Secretary of the Interior * * * may prescribe" to effectuate the purposes of the Wild and Scenic Rivers Act. Less clear, however, is the scope of section 9(a)(ii), which is the focal point of this case.

Part of the difficulty in interpreting section 9(a)(ii) arises from the fact that it covers two discrete concepts. Thus, on the one hand, it provides, subject to valid existing rights, that "the perfection of * * * any mining claim affecting lands within the system shall confer * * * a right * * * only to the mineral deposits and such rights only to the use of the surface and the surface resources as are reasonably required to carrying on prospecting or mining operations." On the other hand, this section also provides, again subject to valid existing rights, that "issuance of a patent to * * * any mining claim affecting lands within the system shall

* * * convey a * * * title only to the mineral deposits and such rights only to the use of the surface resources as are reasonably required to carrying out prospecting or mining operations."

The initial interpretative question is whether the statutory limitation on patenting applies to all mining claims within the Wild and Scenic Rivers system or merely to those claims which were perfected 4/ after inclusion of the land in the system.

It seems to me that, merely as a matter of grammar, the language of section 9(a)(ii) compels the conclusion that the limitation on patenting of the surface estate was meant to apply not merely to those claims which were unperfected as of the date of the inclusion of the land in the system but, rather, was intended to apply to all claims, regardless of when they were perfected, subject to valid existing rights. Thus, the statute uses the disjunctive "or" rather than the conjunctive "and" in its initial phrasing. Had Congress intended to limit the scope of the provision only to claims perfected after the inclusion of the land in the system, it is likely that Congress would have provided that "the perfection of, and issuance of a patent to, any mining claim * * *" triggered the statutory limitations described. Its use of the disjunctive "or" is consistent with the hypothesis that Congress expected that its limitation would apply not merely to unperfected claims but to all claims for which patent was sought.

Beyond the actual language used, further support for this interpretation can be gleaned from the fact that the legislation which the Department originally proposed in 1967 clearly applied the patent limitations to all mining claims, subject to valid existing rights. Thus, section 6(b) of the proposal provided, in relevant part, that:

> After the effective date of this act, subject to valid existing rights, all patents issued under the United States mining laws affecting lands within national scenic river areas shall convey title only to the mineral deposits within the claim, together with the right to use so much of the surface and surface resources as are reasonably required for carrying on mining or prospecting operations and uses reasonably incident thereto * * * and each such patent shall reserve to the United States all title in or to the surface of the lands and products thereof, and no use of the surface of the lands or the products

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4/ It should be noted that, in this context, a mining claim has been "perfected" where, assuming the performance of the requisite acts of location and recordation, a discovery of a valuable mineral deposit has been made within the physical limits of the claim. See, e.g., United States v. Mavros, 122 IBLA 297, 301-302 (1992); United States v. Nickol, 9 IBLA 117, 122 (1973); Clear Gravel Enterprises, Inc., A-27967 (Dec. 29, 1959).

> thereof not required for carrying on activities reasonably incident to mining or prospecting shall be allowed. Mining claims located after the effective date of this Act within national scenic river areas shall create no rights in excess of those rights which may be patented under the provisions of this subsection.

H.R. Rep. No. 1623, 90th Cong., 2d Sess. (1968), reprinted in 1968 U.S.C.C.A.N. 3801, 3818. The purport of the underscored language is clearly to the effect that the patenting limitations applied to all mining claims located prior to the inclusion of the land in the system and not merely to any preexisting unperfected claims in those areas. In the absence of any indication that the language changes subsequently made were intended to alter the scope of the provision, this language buttresses the conclusion that the patenting limitations were not restricted to only claims perfected after inclusion of the land in the Wild and Scenic Rivers system.

There are, however, conflicting manifestations of intent in the legislative history of the Wild and Scenic Rivers Act. Thus, in a letter dated August 14, 1967, to the Chairman of the Committee on Interior and Insular Affairs, then Secretary of the Interior Udall, in providing a report on various bills under consideration, noted that, under the various bills, "[a] mining claim perfected after the lands are included in the system, however, will give the mining claimant title only to the mineral deposits, together with the right to make any use of the land surface of such claim as is reasonably required for his mining operations." H.R. Rep. No. 1623, 90th Cong., 2d Sess. (1968), reprinted in 1968 U.S.C.C.A.N. 3801, 3836-37. The failure of Secretary Udall to similarly note that such a limitation would be applicable to all patents issued under the Act could be taken as an indication that the scope of subsection 9(a)(ii) was intended to cover only claims "perfected" after inclusion of the land in the Wild and Scenic Rivers system.

But, while Secretary Udall's letter might provide some support for a more limited reading of the breadth of section 9(a)(ii), I think it simply an inadequate basis on which to ignore the express language of the statute as actually adopted by Congress, particularly where the discussion by Secretary Udall is actually silent on the subject of patenting, being directed rather to the "perfecting" language appearing in the statute. Moreover, I think note must also be made of an opinion recently issued by the Solicitor. See Patenting of Mining Claims and Mill Sites in Wilderness Areas, M-36994 (May 22, 1998).

In his opinion, which was approved by Secretary Babbitt, Solicitor Leshy held that, under section 4(d)(3) of the Wilderness Act of 1964, 16 U.S.C. § 1133(d)(3) (1994), patents issued for prior existing valid claims on lands included within the wilderness system, where the claimant had not perfected a patent application before the inclusion of the lands

in the wilderness system, would only convey title to the mineral estate. Id. at 21. While not directly on point with the issues presented herein, this opinion is, nevertheless, of some relevance for two discrete reasons.

First of all, as the lead opinion notes, the legislative history of the Wild and Scenic Rivers Act expressly noted that the statute was patterned after the Wilderness Act of 1964. See H.R. Rep. No. 1623, 90th Cong., 2d Sess. 22 (1968), reprinted in 1968 U.S.C.C.A.N. 3801, 3822. Thus, any interpretation of the Wilderness Act should probably be reflected in the interpretation of the Wild and Scenic Rivers Act, particularly where the language involved is so clearly susceptible of similar interpretations.

Second, the fact that the Solicitor was able to interpret the language of section 4(d)(3) of the Wilderness Act as prohibiting issuance of an unrestricted patent except for claims for which a complete patent application had been filed prior to the inclusion of lands covered by those claims into the wilderness system, notwithstanding the fact that this interpretation was contrary to both language in the legislative history and the contemporaneous Departmental interpretation of that provision (see Patenting of Mining Claims and Mill Sites in Wilderness Areas, supra, at 8-10, 19-21), certainly supports a similar interpretation within the confines of the Wild and Scenic Rivers Act, since the latter Act lacks either of the interpretative impediments the Solicitor was forced to hurdle.

Considering all of the foregoing, I must conclude that the patent limitation in the Wild and Scenic Rivers Act applies to all mining claims, regardless of when "perfected," subject only to valid existing rights, and that, absent application for patent and tender of the purchase price, there can be no valid existing right to obtain an unrestricted patent. Accordingly, I concur with the disposition of the instant appeal.

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James L. Burski
Administrative Judge